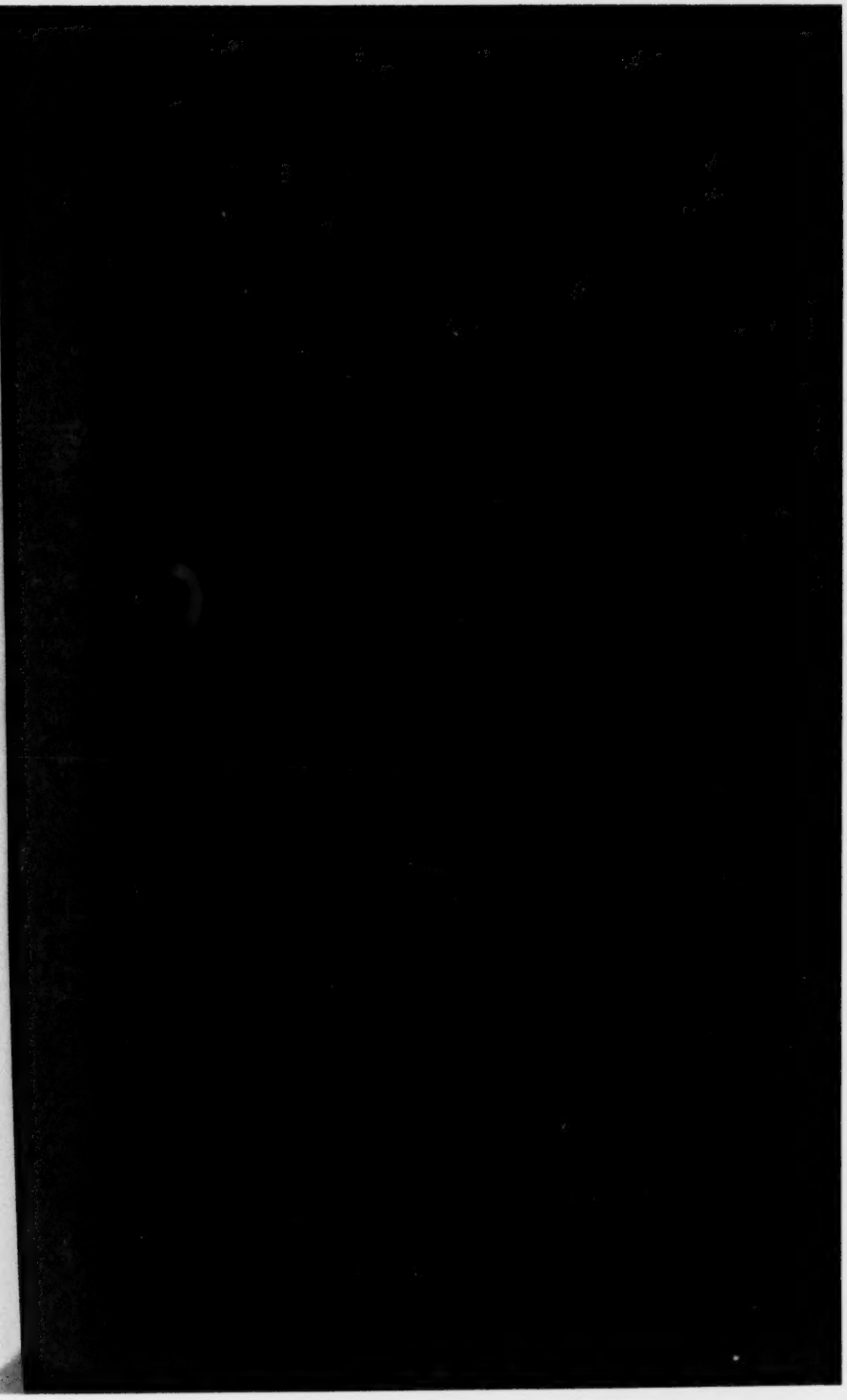

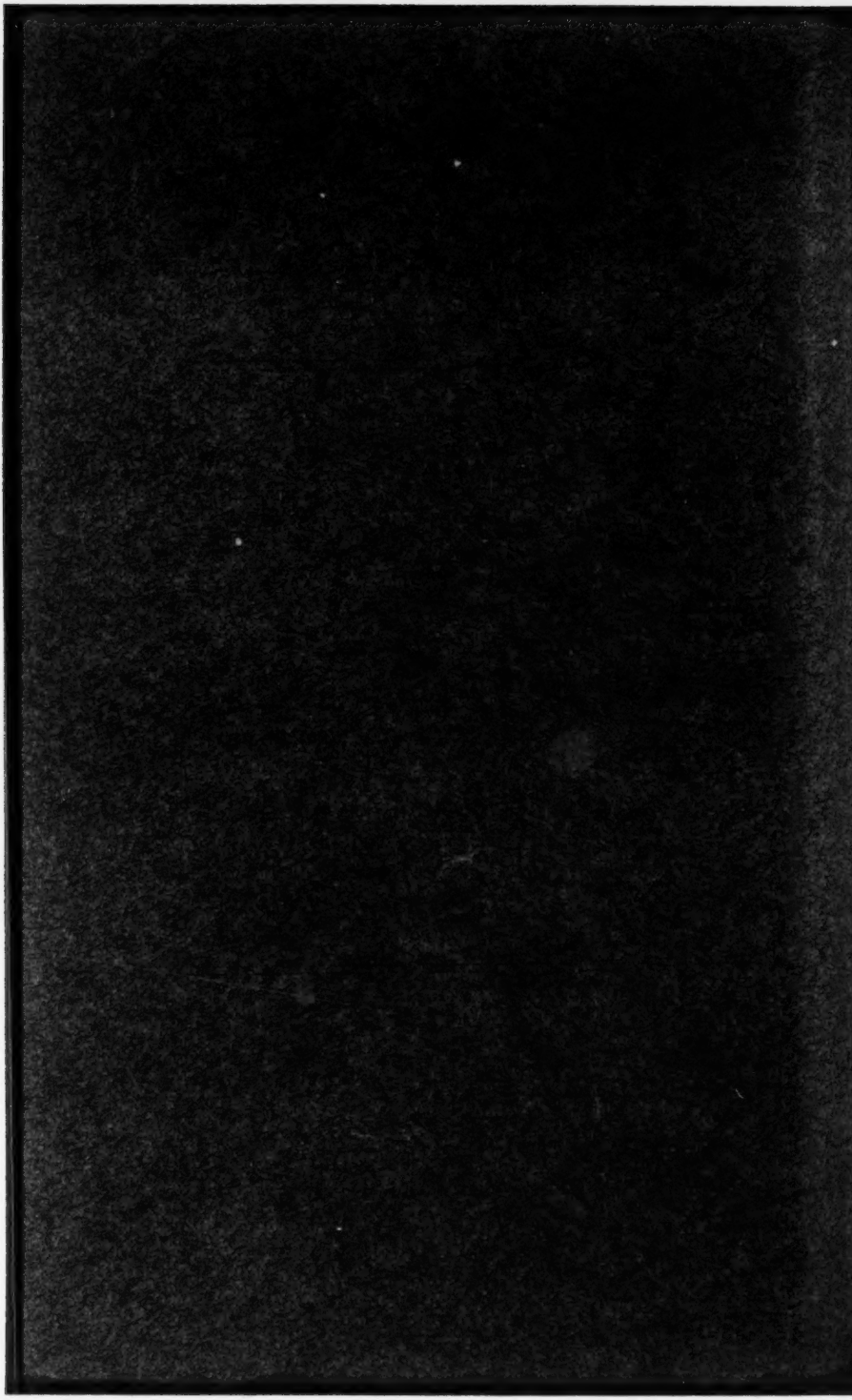

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 113

AMEREX HOLDING CORPORATION, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings and opinion of the Board of Tax Appeals (R. 19–66) are reported in 37 B. T. A. 1169. The *per curiam* opinion of the Circuit Court of Appeals for the Second Circuit (R. 762) is reported in 117 F. (2d) 1009.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 19, 1941. (R. 762–763.) The petition for a writ of certiorari was filed May 31,

1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

During the tax year Mechanics Securities Corporation was liquidated and the taxpayer, as its sole stockholder, received all of its assets, consisting of $444,816.94 in cash, as a liquidating dividend. Under the applicable provisions of the Revenue Act of 1928, the taxpayer, in computing its net income, was entitled to deduct as a loss the difference, if any, between the amount received as a liquidating dividend and the cost to it of the Mechanics Securities stock. The ultimate issue in this case is whether that stock cost respondent $500,000, as the Board found, or $5,270,545.94, as the taxpayer contends. This issue, in turn, depends upon whether, in the transaction pursuant to which the taxpayer received the Mechanics Securities stock, the taxpayer, as it contends, issued its own stock, allegedly worth $5,270,545.94, solely in consideration for the Mechanics Securities stock, or whether the Mechanics Securities stock, as the Board found, was only a part of the consideration for the issuance of the taxpayer's stock.

STATUTE INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 111. DETERMINATION OF AMOUNT OF GAIN OR LOSS.

(a) *Computation of gain or loss.*—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

* * * * *

(d) *Recognition of gain or loss.*—In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of section 112.

* * * * *

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, * * *

* * * * *

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; * * *

* * * * *

SEC. 115. DISTRIBUTION BY CORPORATIONS.

* * * * *

(c) *Distributions in liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. * * *

* * * * *

STATEMENT

The facts, as found by the Board of Tax Appeals (R. 20–51), may be summarized as follows:

Organization of the taxpayer.—The taxpayer is a New York corporation organized in 1917 under the name of Chase Securities Corporation. It was formed as a securities affiliate of The Chase National Bank of New York in order to take advantage of business opportunities which were not available to the bank because of its limited corporate powers, and to engage in a general securities business. (R. 21–22.) It was formed in the following manner:

All of the stockholders of Chase Bank became parties to a deposit agreement between a committee of Chase Bank stockholders and Bankers Trust Company, as depositary, and deposited

thereunder their shares, then aggregating 100,000. A special dividend of $25 per share was paid by Chase Bank to the committee, which acted throughout as agent for the depositing stockholders. The committee then caused the taxpayer to be organized with $2,500,000 capital, represented by 100,000 shares without par value, which were subscribed for in the names of the depositing Chase Bank stockholders, paid for with the proceeds of the special dividend, delivered to the committee, and deposited under the deposit agreement. To evidence the ownership of the deposited shares of Chase Bank and of the taxpayer, the depositary issued to each depositing stockholder a definitive engraved receipt in registered form certifying that it held in his name a certificate for his shares of Chase Bank stock and a certificate for his shares of taxpayer's stock. (R. 21–22.)

Each of the depositing stockholders agreed that he would not sell any of his shares of stock of either Chase Bank or the taxpayer without at the same time selling to the same purchaser an equal number of shares of the other. The taxpayer's certificate of incorporation provided that no shares of its stock issued to any Chase Bank stockholder should be transferable except together with an equal number of shares of Chase Bank stock. The certificate further provided that the sale, pledge, or transfer of any shares of stock of the Chase Bank should "operate *ipso facto* as a

transfer to the same person of a like interest and an equal number of shares of this corporation." (R. 22–23.) An amendment to taxpayer's charter in 1926 provided that no shares of the taxpayer's stock should be issued unless made available for deposit under the deposit agreement and that no stockholder should be entitled to subscribe for newly issued stock of the taxpayer unless at the same time he subscribed for an equal number of shares of Chase Bank stock and deposited all such shares with the depositary (R. 45–46).

The purpose of the foregoing arrangement was to establish and maintain 100% parity of ownership of stock of the Chase Bank and of the taxpayer, and such parity was maintained during all the times here involved. Prior to 1926 the outstanding shares of Chase Bank were increased to 200,000, and the outstanding shares of petitioner were correspondingly increased and all additional shares of each were deposited under the deposit agreement. (R. 23, 36–37.)

Organization of Mechanics Securities and the acquisition of its stock by the taxpayer. On February 11, 1926, Chase Bank and the Mechanics & Metals National Bank (hereinafter called Mechanics Bank) entered into an agreement for the consolidation of the two banks under the name and charter of Chase Bank (R. 23–24).

The consolidation agreement provided that the consolidated bank should have a capital of $40,-

000,000, a surplus of $25,000,000 and, subject to certain conditions, undivided profits of not less than $14,000,000, or a total of not less than approximately $79,000,000; that the capital should be divided into 400,000 shares of $100 par value, of which 200,000 shares should be allotted to the then stockholders of Chase Bank, share for share, 100,000 should be offered to the then stockholders of Chase Bank for subscription at $100 per share, and 100,000 should be allotted to the stockholders of Mechanics Bank, share for share (R. 23–24).

The consolidated bank was to receive all of the assets of each bank except assets of the Mechanics Bank of a value of $500,000, and to assume all of their liabilities. The agreement provided that the net assets to be furnished by the Chase Bank should equal "not less than approximately" $55,000,000 and that the net assets to be furnished by the Mechanics Bank should equal not less than approximately $24,000,000. It was further provided that the assets of the Mechanics Bank aggregating $500,000, which were excepted from the transfer to the consolidated bank, should be transferred before the effective date of consolidation to a new corporation, the stock of which was to be distributed *pro rata* to the shareholders of the Mechanics Bank or their assigns, upon terms and conditions deemed proper by its board of directors. (R. 24–25.)

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At the same meeting of the board of directors of the Mechanics Bank on February 11, 1926 at which the agreement for consolidation was approved, action was taken to organize the new corporation referred to in the consolidation agreement which was to receive the $500,000 excepted assets of the Mechanics Bank. Provision was made, however, that if the consolidation of the two banks should for any reason not become effective in the manner provided in the agreement of consolidation, the assets transferred to the new corporation should be retransferred to the Mechanics Bank. The new corporation, whose organization was thus approved was later designated as the Mechanics Securities Corporation. (R. 25.)

On the same date, February 11, 1926, and as part of the consolidation plan, the taxpayer entered into an "exchange agreement" with a committee of Mechanics Bank stockholders and agreed that if the merger of the Mechanics Bank and Chase Bank became effective, the taxpayer would exchange 100,000 shares of its stock, share for share, for stock of Mechanics Securities Corporation, the new corporation to be formed. (R. 25, 31–36.)

Two days later, on February 13, 1926, the Mechanics Bank mailed to its shareholders a notice of a special meeting to be held on March 18, 1926, to vote upon "the ratification and confirmation of the terms and conditions" of the proposed consolidation of the Chase Bank and the Mechanics

Bank (R. 41). This notice, after describing the plan and pointing out that the stockholders of Mechanics Bank would receive one share of the consolidated bank stock for each share of Mechanics Bank stock then held, continued (R. 42): "In addition, the shareholders of this bank will be given the opportunity to acquire, without additional cost, one share of capital stock of no par value of Chase Securities Corporation for each share of stock of the consolidated bank to be allotted to them". The notice concluded with the statement that under the plan each depositing shareholder of the Mechanics Bank would be entitled to receive, after the consolidation had become effective, one share of Chase Bank stock and one share of Chase Securities stock for each share of Mechanics Bank stock deposited (R. 43).

On March 6, 1926, Mechanics Securities Corporation was incorporated under the laws of New York with an initial capital of $500,000, represented by 100,000 shares of $5 par value (R. 44). Prior to the consolidation, and pursuant to the consolidation agreement, Mechanics Bank transferred to Mechanics Securities (subject to retransfer in event the merger should not become effective) a note receivable for $500,000, and the latter issued 100,000 shares of its stock in the names of the stockholders of Mechanics Bank (R. 46–47).

On March 18, 1926 special meetings of the stockholders of the Chase Bank, the taxpayer and the

Mechanics Bank were held and the various interrelated agreements which formed parts of the consolidation plan were approved. At the meeting of the taxpayer's stockholders, the exchange agreement was ratified, an increase in authorized stock from 200,000 to 400,000 shares was approved and a proposal was approved to offer 100,000 of the additional shares to the taxpayer's then stockholders for subscription at $5 per share (exercisable only on subscription at $100 per share for an equal number of shares of Chase Bank) and to issue the remaining 100,000 shares in accordance with the exchange agreement. (R. 44–46.)

The merger of the two banks became effective at the close of business April 10, 1926 (R. 47). Thereafter, from April 12, 1926 to December 27, 1927, pursuant to the exchange agreement, the taxpayer issued and delivered 100,000 shares of its stock to the Mechanics Bank stockholders, and received from them 100,000 shares of Mechanics Securities stock (R. 49). Thus all stockholders of Mechanics Bank who acquired shares of consolidated bank stock as a result of the consolidation acquired an equal number of shares of the taxpayer's stock. The 100,000 shares of Chase Bank stock offered to its stockholders at $100 per share and the 100,000 shares of the taxpayer offered to its stockholders at $5 per share were fully subscribed for, issued and delivered. All of the 200,000 additional shares of Chase Bank and all

of the 200,000 additional shares of the taxpayer were deposited under the deposit agreement and the parity of ownership of Chase Bank stock and of the taxpayer's stock thus remained as complete after the consolidation as before. (R. 100–101.)

In the five years prior to the consolidation, the taxpayer had shown profits ranging between $1,600,000 and $2,800,000 per year and had paid dividends of $800,000 per year in the last four of those years. Between April 10, 1926 and December 27, 1927, the taxpayer's assets consistently exceeded its obligations by more than $21,000,000. Between April 3, 1926 and June 26, 1926 the price of units of one share of consolidated bank stock and one share of stock of the taxpayer ranged between $405 and $435. (R. 49–50.)

Financial contributions to the consolidation.— As shown by their books, just prior to the merger the net assets of Chase Bank were $47,535,531.29 and those of Mechanics Bank were $25,605,037.77 (R. 47). On this basis, and adding to the Chase Bank assets the $10,000,000 of new capital supplied by its stockholders, Chase Bank furnished approximately 69% and Mechanics Bank approximately 31% of the total assets of the new bank. However, these book valuations were adjusted when the books of the new bank were set up, the new books showing net assets of only $79,053,150.19 (R. 47). The adjustment appears to have been made by writing

down the book value of the Chase Bank assets by $4,500,000 and writing up the book value of the Mechanics Bank assets by $412,581.13, leaving a net write-down of $4,087,418.87 (R. 275). Making these adjustments, the Board computed that $53,-035,531.29 of the net assets of the consolidated bank, or about 67 percent, were furnished by the Chase Bank, and that $26,017,618.90, or about 33 percent, were furnished by the Mechanics Bank (R. 63). The Board further concluded that, taking the total net assets of the consolidated bank and of the taxpayer together, approximately 74 percent of the assets were contributed by the stockholders of Chase Bank and of the taxpayer as it existed before the merger, and approximately 26 percent contributed by the stockholders of the Mechanics Bank (R. 64). Because of these facts, because of the fact that the stockholders of Chase Bank and the taxpayer were identical, and because it determined that the taxpayer, a $21,000,000 corporation, would not have issued one fourth of its stock for other stock worth, at most, $500,000, the Board concluded that taxpayer's stock was issued, not alone for Mechanics Securities stock, but also as part of the consideration to the Mechanics Bank stockholders for their acceptance of the consolidated bank stock (R. 59–65).

Dissolution of Mechanics Securities.—Mechanics Securities was dissolved on October 26, 1928, and

on October 29, 1928, it was completely liquidated and the taxpayer received all of its assets, consisting of $444,816.94 in cash, as a first and final liquidating dividend (R. 50). Prior to the consolidation the taxpayer carried the stock of the Mechanics Securities Corporation on its books in its investment account at $500,000. After the dissolution the taxpayer debited its cash account with $444,816.94, the amount received, debited its profit and loss account with $55,183.06, and credited its investment account with $500,000. (R. 50.)

In its income-tax return for the year 1928 the taxpayer claimed a loss of $4,307,066.58 upon the liquidation of Mechanics Securities Corporation, represented as the difference between taxpayer's alleged cost of its 100,000 shares of Mechanics Securities stock and the amount which it received upon liquidation of that corporation. Taxpayer reported a net income of $463,657.52, after deduction of the claimed loss, in respect of which it paid to the Collector a tax of $55,638.90. (R. 50–51.)

The Commissioner determined that the cost to the taxpayer of the Mechanics Securities stock was $500,000 and accordingly reduced the loss deduction from $4,307,066.58, as claimed, to $55,183.06 (R. 51), and determined a deficiency of $510,226.02 against the taxpayer for the year 1928 (R. 12–15). The Board of Tax Appeals found that the cost to the taxpayer of the Mechanics Securities stock was not in excess of $500,000 (R. 51, 65) and sus-

tained the deficiency (R. 67).[1] The Circuit Court of Appeals affirmed *per curiam* (R. 762).

ARGUMENT

1. The Board found as a fact that the taxpayer, a corporation with net assets worth more than $21,000,000, did not issue one-fourth of its stock, worth more than $5,000,000, in return solely for the Mechanics Securities stock, which was worth at most $500,000. It found, rather, that "the consolidation of the Mechanics Bank with the Chase Bank was part of the consideration for the agreement on petitioner's part to issue 100,000 of its shares to the stockholders of the Mechanics Bank" and further that "the receipt of those shares by the Mechanics Bank stockholders was part of the consideration for their approval of the merger of that bank with the Chase Bank" (R. 61). Finally, the Board found as a fact that "the portion of the fair market value of petitioner's said shares which may be determined as the cost of the Mechanics Securities stock was not in excess of $500,000 * * *" (R. 65).

These findings of the Board, which were expressly held by the court below to be "amply supported by the record" (R. 762), are determina-

[1] After the Board hearing the Commissioner, upon the theory that no deductible loss at all was indicated by the proof, filed an amended answer so asserting. This contention was rejected by the Board (R. 65–66) and the Commissioner did not appeal.

tive of this case, for they establish (1) that the taxpayer's 100,000 shares of stock were not issued solely for the Mechanics Securities stock; (2) that the Mechanics Securities stock was the consideration for the issuance of at most $500,000 worth of taxpayer's stock; and (3) that therefore the cost of the Mechanics Securities stock to the taxpayer was not in excess of $500,000. On the basis of these findings, petitioner's deductible loss on the liquidation of Mechanics Securities Corporation was, of course, not $4,307,066.58, as claimed, but at most $55,183.06, as allowed.

The petition for a writ of certiorari seeks, in effect, to have this Court review the substantiality of the evidence supporting these findings of the Board. Certiorari will, of course, ordinarily not be granted for such a purpose. *National Labor Relations Board* v. *Waterman Steamship Co.*, 309 U. S. 206, 208. And here, as the court below held, the record furnishes ample support for the Board's conclusion.

It is plain, as the Board found, that the taxpayer would not have issued 100,000 shares, or one-fourth of its stock, worth more than $5,000,000, merely for the stock of Mechanics Securities Corporation, whose sole asset was a $500,000 note receivable. It is equally plain, as the Board also found, that the stockholders of Mechanics Bank would not have agreed to a merger of their bank, having net assets of $26,017,618.90, with Chase

Bank, having net assets of $53,035,531.29 in consideration of one-fourth of the stock of the consolidated bank. The Mechanics Bank stockholders agreed to the consolidation because, in addition to receiving a share of Chase Bank stock for each share of Mechanics Bank stock, they also received a share of taxpayer's stock. And the taxpayer agreed to give shares of its stock to the Mechanics Bank stockholders for shares of Mechanics Securities stock in order to induce the Mechanics Bank stockholders to agree to the consolidation; this was of advantage to all of the taxpayer's stockholders because each of them had the same number of shares of Chase Bank stock as of the taxpayer's stock.

Stated otherwise, the exchange of taxpayer's stock for Mechanics Securities stock was simply an integral part of a single consolidation plan which contemplated, not that the Mechanics Securities stock should be the consideration for the taxpayer's stock, but that 100,000 shares of the taxpayers' stock plus 100,000 shares of the consolidated bank stock should be the consideration to the Mechanics Bank stockholders for their contribution to the consolidated bank and the taxpayer, taken together, of all the Mechanics Bank assets. The essence of the plan, reading all of the interrelated agreements together, was that the Mechanics Bank should furnish approximately one-fourth of the net assets of the consolidated bank and of the taxpayer, taken together, and in

return the stockholders of Mechanics Bank were to get one-fourth of the stock of the consolidated bank and one-fourth of the taxpayer's stock. The division of the Mechanics Bank assets between the consolidated bank and the taxpayer was wholly arbitrary; in view of the parity of ownership of the stock of the Chase Bank and of the taxpayer, preserved after as before the consolidation, it made no difference to the stockholders whether the Mechanics assets were given to the consolidated bank, to the taxpayer, or, if to both, in what proportion they were given to each.

In these circumstances, it is clear that the Board correctly found that the 100,000 shares of taxpayer's stock were not issued merely as consideration for the stock of the Mechanics Securities Corporation, but also as part of the consideration for assets which the Mechanics Bank transferred to the consolidated bank. No other conclusion seems possible on the record. And, at the least, the Board's conclusion is supported by substantial evidence.

2. Taxpayer asserts that both parties at the Board hearing assumed that the sole consideration for the taxpayer's stock was the Mechanics Securities stock, and that since the Board's decision was based upon a denial of this assumption, the taxpayer is entitled to further opportunity to present proof on the issue. The Commissioner, however, has consistently taken the position that there was no warrant for using the excessive cost basis

claimed by the taxpayer in computing its loss. Although the Commissioner's reasons for his position have varied somewhat, he at no time conceded that the only consideration for the taxpayer's stock was the Mechanics Securities stock. To the contrary, he took pains to establish the relationship of the exchange to the bank merger and the connection between the Chase Bank stock and taxpayer's stock, as the stipulation of facts shows (R. 91–104). The burden was on the taxpayer of proving that it had suffered a loss and the amount of loss; that burden, of course, includes the burden of proving the cost of the assets which caused the alleged loss. *Burnet* v. *Houston,* 283 U. S. 223, *Helvering* v. *Taylor,* 293 U. S. 507, 514. No action taken by the Commissioner before the Board relieved the taxpayer of that burden.

The cases referred to in the petition are in no respect in conflict with the decision here. In *Booth Fisheries Co.* v. *Commissioner,* 84 F. (2d) 49 (C. C. A. 7th), the Commissioner had conceded the amount of loss deductible if the taxpayer was entitled to the loss as a matter of law. The court held that, in view of this concession, the failure of the taxpayer to prove the amount of the asserted loss did not defeat its right to a deduction for such loss. Here, however, the Commissioner has never ceased to question the amount of loss claimed by the taxpayer and the cost basis upon which it was calculated.

In *Hormel* v. *Helvering,* and *Helvering* v. *Richter,* Nos. 257 and 516, October Term 1940, decided March 17, 1941, this Court remanded the causes to the Board for the taking of further testimony because the Board was reversed on a theory not considered by it. Here, however, the Board has been sustained in a conclusion which is inescapable from the evidence presented to it. If the Board has thought that additional evidence might have been adduced to change that conclusion, it could have called for a rehearing upon its own motion. Taxpayer could also have moved for a rehearing, but it failed to do so. In these circumstances, the court below clearly did not err in failing to remand the case to give petitioner further opportunity to show that it issued $5,000,000 worth of its own stock solely for $500,000 worth of Mechanics Securities stock.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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